

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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PATRICIA NEWELL,

Plaintiffs,

vs.

WAL-MART STORES, INC.,

Defendants.

2:13-cv-00123-RJC-NJK

ORDER

_____ This matter comes before the Court on the Defendant's Motion to Compel Plaintiff to Comply with FRCP 26(a)(1)(A)(iii) and for Extension of Defendant's Expert Disclosure Deadline to 60 Days After the Plaintiff Provides Rule-Compliant Disclosures of Her Damages (#18). The Court has considered the Defendant's Motion (#18), the Plaintiff's Limited Opposition (#20), and the Defendant's Reply (#21).

BACKGROUND

I. Factual Background

On January 2, 2011, Plaintiff Patricia Newell allegedly slipped and fell at a Wal-Mart store in Las Vegas, Nevada. According to Newell, the fall caused her numerous injuries and she has undergone extensive therapy and medical treatment, including a lumbar laminectomy and a microlumbar discectomy on August 16, 2011. Additionally, Newell's doctor has recommended a 2-level fusion.

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II. Procedural Background

Newell filed this case on November 26, 2012, in Nevada District Court. On January 22, 2013, Wal-Mart removed the case to the United States District Court for the District of Nevada. On March 1, 2013, the Court entered a discovery plan and scheduling order setting a discovery deadline of July 21, 2013. The initial expert deadline was May 22, 2013.

On March 11, 2013, Newell provided her Fed.R.Civ.P. 26(a) disclosures.¹ Both parties agree that Newell's initial disclosures included a computation of damages and supporting documentation regarding her past medical damages claim, documentation regarding her future medical damages claim, and a statement that "at trial, the jury will decide upon a sum of money" for the past wage loss, future wage loss and earning capacity, and loss of household services claims. *See* Docket No. 20-1. On March 29, 2013, Newell supplemented her initial disclosures. The supplement outlined five categories of damages and the amounts each as follows:

Past Medical and Related Expenses	\$63,121.99
Future Medical and Related Expenses	\$158,000-\$173,160
Past Wage Loss	\$1,280
Future Wage Loss and Earning Capacity	\$83,200
Loss of Household Services	\$327,449
Total Special Damages	\$633,050.99-\$648,210.99

See Docket No. 20-2.

On May 3, 2013, Newell provided her expert report, a letter from her treating physician regarding her future medical damages (which was also provided on March 11, 2013), and two W-2 forms from 2010 and 2011. According to Wal-Mart, the expert report concerns damages for the loss of household services, but it does not address the past wage loss damages or future wage loss and earning capacity damages. Docket No. 21 at 6. Newell states that the expert report concerns "future damages." Docket No. 20 at 4.

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¹ The disclosures were due February 28, 2013. *See* Docket No. 11 at 1.

1 In the present motion, Wal-Mart seeks a court order which compels Newell to produce
 2 documentation and calculations for her past wage loss damages and future wage loss and earning
 3 capacity damages. Additionally, Wal-Mart seeks an additional 60 days after such disclosures are
 4 made to disclose its experts.

5 DISCUSSION

6 **I. Motion to Compel Rule-Compliant Damages Disclosures**

7 Wal-Mart asserts that Newell's disclosures do not comply with Fed.R.Civ.P.
 8 26(a)(1)(A)(iii).

9 Pursuant to Fed.R.Civ.P. 26(a)(1)(A)(iii), a party's initial disclosures must include:

10 a computation of each category of damages claimed by the disclosing party—who must
 11 also make available for inspection and copying as under Rule 34 the documents or other
 12 evidentiary material, unless privileged or protected from disclosure, on which each
 computation is based, including materials bearing on the nature and extent of injuries
 suffered

13 Thus, all initial disclosures must include a computation of each category of damages and
 14 any documentation on which each computation is based. However, under Fed.R.Civ.P. 26(e), "if
 15 the party learns that in some material respect the disclosure or response is incomplete or
 16 incorrect, and if the additional or corrective information has not otherwise been made known to
 17 the other parties during the discovery process or in writing," the disclosing party "must
 18 supplement or correct its disclosure or response in a timely manner." Fed.R.Civ.P. 26(e).

19 **A. Past Medical and Related Expenses and Future Medical and Related Expenses**

20 Wal-Mart does not dispute that Newell provided documentation and a calculation for her
 21 past medical and related expenses on March 11, 2013. Although the disclosure was 11 days late,
 22 the delay appears to have been harmless. As Wal-Mart points out, it still had "72 of the allotted
 23 83 days to defend itself against these claims." Docket No. 21 at 8.

24 The same is true for Newell's future medical and related expenses. Wal-Mart asserts that
 25 Newell provided documentation of her future medical and related expenses on March 11, 2013,
 26 but did not provide a calculation until March 29, 2013. The documentation Wal-Mart refers to is
 27 a letter from Newell's treating physician regarding her future medical damages. Having reviewed
 28 the letter, the Court finds that it includes estimates of Newell's future medical expenses and,

1 therefore is sufficient under Fed.R.Civ.P. 26(a)(1)(A)(iii). Thus, the disclosure was only 11 days
2 late and readily remedied.

3 **B. Past Wage Loss Damages and Future Wage Loss and Earning Capacity Damages**

4 According to Wal-Mart, it has not received documentation or a calculation concerning
5 Newell's past and future wage loss damages. Although Newell does not specifically respond to
6 this allegation, she asserts that: (1) she has provided wage loss documents, (2) she has continued
7 to supplement information as it has become available, and (3) certain types of damages can only
8 be supported by expert testimony. Specifically, she argues, future damages can not be included in
9 her disclosures until experts have been disclosed.

10 The "wage loss documents" Newell refers to are presumably the W-2 forms from 2010
11 and 2011 which she produced on May 3, 2013. However, based on these two forms, it is unclear
12 how she arrived at her damages amounts of \$1,280 in Past Wage Loss and \$83,200 in Future
13 Wage Loss and Earning Capacity. Thus, to date, Newell has not complied with Fed.R.Civ.P.
14 26(a)(1)(A)(iii), because she has not provided a calculation.² Additionally, if Newell relied on
15 any additional documentation to support her wage loss damages claims, she must provide those
16 as well.

17 Newell's argument that she has continued to supplement information as it has become
18 available does not explain her failure to provide proper documentation and calculations for her
19 wage loss claims. First, the W-2 forms Newell produced on May 3, 2013, are from 2010 and
20 2011. Thus, they were available and should have been produced on February 28, 2013, when they
21 were due. Newell provides no apparent justification for the two month delay. Second, as early as
22 March 29, 2013, Newell had clearly calculated her wage loss claims, because she indicated her
23 damages were \$1,280 in Past Wage Loss and \$83,200 in Future Wage Loss and Earning
24 Capacity. Yet, despite providing those lump sum totals, she did not indicate how she calculated
25 those amounts. Pursuant to Fed.R.Civ.P. 26(a)(1)(A)(iii), Wal-Mart is entitled to those

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27 ²Newell states that the expert report concerns "future damages." Docket No. 20 at 4.
28 However, Newell's May 22, 2013, supplement to the expert disclosures pursuant to FRCP 26(A)(2)
does not indicate that wage loss calculations have been provided. See Docket No 21-14, Exhibit N.
If such a calculation has been provided, it is not apparent from the information before the Court.

1 calculations.

2 Finally, Newell's contention that certain types of damages, such as future damages, can
3 only be supported by expert testimony does not relieve her from the obligation to provide
4 information reasonably available. See *Olaya v. Wal-Mart Stores, Inc.*, 2012 WL 3262875. *2 (D.
5 Nev. Aug. 7, 2012); citing *Frontline Medical Assocs., Inc. v. Coventry Health Care*, 263 F.R.D.
6 567, 569 (C.D.Cal.2009). Thus, the documents and computation she used to arrive at her lump
7 sum totals must be provided to Wal-Mart.

8 **C. Loss of Household Services**

9 Wal-Mart argues that it did not receive any documentation or calculations for Newell's
10 loss of household services damages claims until May 3, 2013, when Newell disclosed the expert
11 report of Terrence's M Clauretie, Ph.D.. Newell asserts that this disclosure was proper because
12 certain types of damages can only be supported by expert testimony. However, on March 29,
13 2013, Newell indicated that her loss of household services damages were \$327,449. Thus, she
14 clearly used some calculation prior to obtaining expert testimony. Under Fed.R.Civ.P.
15 26(a)(1)(A)(iii), Wal-Mart is entitled to know what documentation and calculation she used to
16 arrive at the amount of \$327,449, on March 29, 2013.

17 Further, even though Newell has provided an expert report which is likely intended to
18 provide a more accurate calculation of loss of household services damages, that does not excuse
19 Newell from her Fed.R.Civ.P. 26(a)(1)(A)(iii) obligation to provide Wal-Mart with the
20 documentation and calculation she used prior to obtaining an expert. Accordingly, Newell must
21 provide this information if she has not done so already.

22 **II. Motion to Extend Defendant's Expert Disclosure Deadline**

23 Wal-Mart argues that it has been prejudiced by not receiving the documentation and
24 calculations, discussed above, earlier in the discovery process. According to Wal-Mart, it needs
25 a 60 day extension of its expert disclosure deadline, from the date Newell makes the required
26 disclosures, in order to prepare and retain expert witnesses in order to cure the prejudice. Wal-
27 Mart previously requested that Newell stipulate to this extension, but the parties could not agree
28 on the wording of the stipulation. In response to Wal-Mart's motion, Newell indicates that she

1 does not oppose the extension, but she would like the extension to apply to both parties and
2 further, she believes 30 to 45 days should be sufficient.

3 Applications to extend discovery dates must be supported by good cause. LR 26-4. The
4 good cause standard primarily considers the diligence of the party seeking the amendment.
5 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). The scheduling order
6 can be modified if it cannot reasonably be met despite the diligence of the party seeking the
7 extension. *Id.* Good cause may be found if the moving party can show that it could not comply
8 with the schedule due to matters that could not have been reasonably foreseen at the time of the
9 issuance of the scheduling order. *Kuschner v. Nationwide Credit, Inc.*, 256 F.R.D. 684, 687
10 (E.D. Cal. 2009). If the moving party was not diligent, the inquiry should end. *Zivkovic v. S.*
11 *California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); *Mammoth Recreations, Inc.*, 975
12 F.2d at 609. However, the Court has broad discretion in supervising the pretrial phase of
13 litigation. *Zivkovic*, 302 F.3d at 1087.

14 Here, the Court finds that Wal-Mart has shown good cause for an extension. It made
15 numerous efforts to obtain the damages information earlier in discovery and is not at fault for the
16 delay. Additionally, although such an extension can disrupt the schedule of the Court, the Court
17 finds that in this case an extension of Wal-Mart's expert disclosure deadline is the most
18 appropriate course of action because it will allow Wal-Mart to retain expert witnesses and it will
19 cure any prejudice. Newell, however, has not shown good cause for an extension of her expert
20 disclosure deadline and, therefore, the extension will not apply to her.

21 As for the length of Wal-Mart's extension, the Court finds that 45 days from the issuance
22 of this order is sufficient.

23 **III. Request for Sanctions**

24 Wal-Mart has requested, pursuant to Fed.R.Civ.P. 37(a)(5), that the Court order Newell
25 and/or her counsel to pay the reasonable expenses, including attorney's fees, incurred in making
26 its motion.

27 Under Fed.R.Civ.P. 37(a)(5), if a motion to compel is granted, the Court must require the
28 party whose conduct necessitated the motion to pay the movant's reasonable expenses incurred in

1 making the motion, including attorney's fees. Fed.R.Civ.P. 37(a)(5). However, the Court must
2 not order this payment if the opposing party's nondisclosure, response, or objection was
3 substantially justified. *Id.*

4 Here, the Court finds that Newell's response, although incorrect, was substantially
5 justified. Newell had already made many of the contested disclosures, and additionally, she was
6 attempting to properly supplement her deficient disclosures. Accordingly, sanctions are not
7 warranted.

8 **CONCLUSION**

9 Based on the foregoing, and good cause appearing therefore,

10 IT IS HEREBY ORDERED that Defendant's Motion to Compel Plaintiff to Comply
11 with FRCP 26(a)(1)(A)(iii) and for Extension of Defendant's Expert Disclosure Deadline to 60
12 Days After the Plaintiff Provides Rule-Compliant Disclosures of Her Damages (#18 is
13 **GRANTED in part and DENIED in part;**

14 IT IS FURTHER ORDERED that the Defendant's request for an Order to compel FRCP
15 26(a)(1)(A)(iii) compliant disclosures is GRANTED;

16 IT IS FURTHER ORDERED that the Plaintiff must make FRCP 26(a)(1)(A)(iii)
17 compliant disclosures within 7 days of the issuance of this Order;

18 IT IS FURTHER ORDERED that Defendant's request for an extension of its expert
19 disclosure deadline is GRANTED;

20 IT IS FURTHER ORDERED that the Defendant's expert disclosure deadline is extended
21 for a total of 45 days from the issuance of this Order;

22 IT IS FURTHER ORDERED that the Defendant's request for reasonable expenses and
23 attorney's fees is DENIED.

24 DATED this 21 day of June, 2013

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NANCY J. KOPPE
United States Magistrate Judge